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In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD L. COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether American police officers could lawfully question a suspect about a crime after the suspect had asked foreign police officers, who were investigating a violation of foreign law, for permission to speak with counsel.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 26 M.J. 451. The opinion of the Court of Military Review (Pet. App. 7a-20a) is reported at 25 M.J. 679.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1988. The petition for a writ of certiorari was filed on November 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Kaiserslautern, West Germany. He was convicted of murder, aggravated assault,

and assault and battery, in violation of Articles 118, 128(a), and 128(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 928(a), and 928(b). He was sentenced to five years' imprisonment, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On July 28, 1986, petitioner's two and one-half month old daughter Teresa died while in the care of petitioner and his wife at petitioner's apartment in Misenbach, West Germany. The autopsy revealed that Teresa died of blunt force injuries to her head, causing a skull fracture, associated hemorrhages, and brain swelling. Tr. 285. The autopsy also revealed several older injuries including nine broken ribs and internal head injuries. Tr. 285-289; GX 32. A forensic pathologist testified that Teresa received at least four blunt force blows to her head within 24 hours of her death. Tr. 284-285, 290, 300. A "significant" amount of force was required to cause the fatal head injuries. Tr. 287. The pathologist also stated that Teresa's broken ribs could not have been caused by "hugging the baby." Tr. 299. A baby's ribs are very resilient, he said, and a "massive" or "tremendous amount of force" would be required to fracture them by squeezing the child. *Ibid.*

2. The death occurred in a German community, and the German police began an investigation on July 29, 1986.[1] Pursuant to a regulatory requirement to investi-

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[1] Under applicable law the Federal Republic of Germany had jurisdiction over the offense regardless of who committed it. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, art. VII, §§ 2-3, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. The United States had concur-

gate "unattended deaths" (*i.e.*, deaths that occur without a physician present) the Army's Criminal Investigation Division (CID) also began its own separate investigation. Tr. 30, 35, 39, 44, 46, 51. A German policeman told petitioner and his wife that they were required to come to the German police station the next day for an interview. Tr. 30. The next morning, a sergeant from petitioner's unit drove petitioner and his wife to the German police station. AX 10, at 1; Tr. 42. Prior to the autopsy, a German police officer informed petitioner of his rights under German law to remain silent and to consult a lawyer before or during questioning. Tr. 21-22; AX 11. Petitioner indicated on a German form that he did not want to make a statement and added "at this time" in his own handwriting. Petitioner also indicated that he wanted to consult a lawyer. Tr. 21-22; AX 41. Later that day, after being confronted with the autopsy results by the German Chief Prosecutor, petitioner explained that he had dropped his daughter as he was feeding her, but he declined to put that statement in writing. Tr. 24-27, 263-265; AX 10. The Germans did not attempt to question petitioner further. Tr. 24. There were no American personnel present during any part of the interview of petitioner by the German authorities, and the interview was not conducted at the behest of the CID. *Ibid.*; Pet. App. 11a.

Shortly thereafter, two Army CID agents transported petitioner and his wife to the CID office in order to take a statement from them about the death of their child. Tr. 32, 41, 43, 46, 59; AX 10, at 1. Special Agent Joseph Herron was aware that petitioner had requested an attorney at the German police station. Another agent had

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rent jurisdiction and the primary right to prosecute once it was determined that petitioner, a United States serviceman, was to be charged with committing the offense. *Ibid.*

been advised by an American attorney that petitioner could be questioned, but only after he was advised of his rights under United States law. Tr. 64, 77-78, 81, 85; AX 10, at 1. Special Agent Herron fully advised petitioner of his rights under Article 31(b) of the UCMJ, 10 U.S.C. 831(b), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner waived those rights "[w]ithout hesitation" (Tr. 70) and executed a standard waiver of rights form. AX 12. Petitioner initially stated that Teresa hit her head against the supporting legs of a mechanical swing. Tr. 62-64. After being told that his story was implausible, petitioner changed his account. In a sworn statement, petitioner admitted "slapping" his infant daughter in the head "two or three times" because she was ill, and "squeezing and shaking" Teresa "[m]aybe three or four times" because she would not eat. GX 34, at 1, 2. Petitioner also said that he might have struck his daughter with his fist. *Id.* at 3.

3. At trial, petitioner moved to suppress his statement. Petitioner alleged, among other things, that his waiver was invalid. Petitioner argued that his request to the German police for counsel should be treated the same as a request to American police, and that Agent Herron therefore violated *Edwards* v. *Arizona*, 451 U.S. 477 (1981), when he subsequently questioned petitioner. AX 8. Petitioner did not testify on the motion or present evidence. Tr. 86.[2] After a full evidentiary hearing, the trial judge denied the motion. Tr. 100-102. The trial judge found that petitioner's request for counsel, made to German authorities investigating a violation of German law, did not preclude his interrogation by American authorities investigating a

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[2] Petitioner elected not to testify on the motion even though under Mil. R. Evid. 301(e) he could have limited his testimony (and cross-examination) to the issue of his waiver.

violation of American law. Tr. 101. At trial, petitioner testified and recanted his confession. Tr. 305. He claimed that he had lied in his sworn statement in order to protect his wife. Tr. 306.[3]

4. The Army Court of Military Review affirmed. Pet. App. 7a-20a. It found no evidence of any involvement by American authorities in petitioner's interrogation at the German police station.[4] The court held that American law did not apply to independent actions by German authorities, and that the rule of *Edwards* v. *Arizona*, *supra*, was not triggered by petitioner's request for counsel made to the German police. Pet. App. 19a.

5. The Court of Military Appeals affirmed. Pet. App. 1a-6a. It observed that the rule adopted in *Edwards* and

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[3] Petitioner's wife testified that she had caused her daughter's death by slapping her several times on the head three days earlier, on July 25, 1986. Tr. 146-147, 152-154. The forensic pathologist testified, however, that the injuries that killed Teresa Coleman were sustained within 24 hours of her death. Tr. 277-278, 284-285. He concluded "with reasonable medical certainty" that Mrs. Coleman's assault on her daughter—if it occurred as she described it—could not have caused her daughter's death. Tr. 290.

[4] The court of military review stated that the result would be different if the actions of the German police had been "conducted, instigated, or participated in, by United States officials [or] * * * used as a subterfuge to circumvent the constitutional protections otherwise afforded an accused." Pet. App. 16a. The Court of Military Appeals made the same observation. *Id.* at 3a n.1. That test is applied by both civilian and military courts. See, *e.g.*, *United States* v. *Mundt*, 508 F.2d 904, 906 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975) (*Miranda* warnings are not essential to the validity of a confession given in a foreign country unless foreign officials acted as agents of United States officials); *United States* v. *Jones*, 6 M.J. 226 (C.M.A. 1979) (whether foreign police must warn a suspect of his *Miranda* rights prior to interrogation turns on whether the foreign police are acting as instrumentalities of military authorities). The *Jones* rule is codified in Mil. R. Evid. 305(h)(2).

applied in *Arizona* v. *Roberson*, No. 87-354 (June 15, 1988), focuses on the state of mind of the suspect, and that "the facts leading an American suspect to request counsel during an interview by German police may be entirely different from those affecting his decision during an American interview." Pet. App. 6a. The court declined to extend *Edwards* to petitioner's situation, but emphasized the "necessity of a complete rights advisement" by American authorities following a request for counsel made to foreign authorities. *Id.* at 6a n.3.

ARGUMENT

Petitioner contends that his request for counsel to a German police officer investigating a violation of German law triggered the rule of *Edwards* v. *Arizona* and precluded later questioning by American authorities investigating a violation of American law. All three courts below properly rejected that claim. As those courts correctly recognized, there is an important difference between the case of a suspect who has invoked his right to counsel under American law while in the custody of American police, and that of a suspect who has invoked a right to counsel under foreign law while in the custody of foreign police. In the latter situation, the suspect has not triggered the *Edwards* rule, because there has been no custodial interrogation by officials to whom the Fifth Amendment is applicable.

In *Miranda* v. *Arizona*, 384 U.S. 436, 439 (1966), this Court addressed the "admissibility of statements obtained from an individual who is subjected to custodial interrogation." The Court devised a prophylactic rule designed to protect a suspect's Fifth Amendment privilege against compulsory self-incrimination from the inherent coercion present during custodial interrogation by assuring that

"the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." 384 U.S. at 469. One of the requirements of the *Miranda* rule is that prior to interrogating a suspect in custody, a law enforcement officer must inform him that he has the right to an attorney. *Id.* at 444. The Court added that if the suspect requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created an additional prophylactic rule to deal with cases in which a suspect in custody makes a request for counsel after receiving *Miranda* warnings. In *Edwards*, the suspect was arrested and submitted to questioning following *Miranda* warnings, but later stated that he wished to consult with an attorney. The police renewed their questioning the following day while the suspect remained in police custody. The resulting confession was held inadmissible on the ground that the suspect had not effectively waived his previously invoked right to counsel. This Court held that when a suspect in custody asks to speak with a lawyer, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485. The new rule, the Court explained, was justified by the concern that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984).

Recently, in *Arizona* v. *Roberson*, No. 87-354 (June 15, 1988), this Court extended the *Edwards* rule to police-initiated interrogations following an arrested suspect's

request for counsel in the course of a separate investigation. In *Roberson*, the suspect invoked his right to counsel after receiving *Miranda* warnings. Later, while he remained in custody, the suspect waived his right to counsel and responded to police-initiated questions about different crimes. Emphasizing the virtue of a bright-line rule (*Roberson*, slip op. 5), the Court held that *Edwards* barred the second interrogation even though the interrogators did not know that Roberson had previously asked to speak with a lawyer. In response to the argument that a suspect might have a good reason for wanting to speak with the police about the crimes involved in the new investigation, the Court stated that the "simple answer is that the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice." *Roberson*, slip op. 10.

Petitioner argues (Pet. 4, 7) that that same "simple answer" applies to his case, invalidates his waiver, and bars the use of his admissions against him. Petitioner's argument, however, ignores the critical distinction between this case and *Roberson*. In *Roberson*, as in every case in which this Court has applied the *Edwards* rule,[5] the suspect was in the custody of American officials throughout and had invoked his right to counsel under American law. By contrast, petitioner was not in the custody of American officials when he requested counsel, nor was he questioned by American officials while he was in the custody of the German police. The Army CID officers therefore did not violate the *Edwards* rule by questioning petitioner at CID headquarters, because that rule

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[5] See *Connecticut* v. *Barrett*, 479 U.S. 523 (1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); *Solem* v. *Stumes*, 465 U.S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983); *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

was not triggered when petitioner asked the German police for permission to speak with a lawyer.

The Fifth and Fourteenth Amendments prohibit federal and state officers from compelling a person to be a witness against himself in a criminal case, but those Amendments do not apply to the actions of foreign law enforcement officers, as the military courts correctly recognized. Pet. App. 4a, 15a-18a.[6] Just as the Fifth Amendment does not apply to the actions of a private party because there is no state action involved, the Fifth Amendment likewise does not apply to the actions of a foreign law enforcement officer, since his actions, although governmental, do not consitute the kind of "state action" to which our Constitution applies. For these reasons, the courts of appeals have uniformly held that the *Miranda* and *Edwards* rules do not apply to questioning by foreign law enforcement officers in a foreign land unless American law enforcement officers have participated significantly in that investigation.[7]

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[6] As the Ninth Circuit explained in *United States* v. *Covington*, 783 F.2d 1052, 1056-1057 (1985), cert. denied, 479 U.S. 831 (1986) (citation omitted): "*Miranda* was, and remains a prophylactic device designed to protect the exercise of Fifth Amendment rights by criminal defendants. When there has been no compulsion by a state or federal agent, either directly or by significant participation by such an agent, then the constitutional mandate has not been violated. Therefore, when a law enforcement officer of a foreign country does not follow the requisites of *Miranda* and *Edwards*, the fifth amendment right against self-incrimination has not been violated and there is no requirement for invocation of the exclusionary rule."

[7] See, *e.g.*, *United States* v. *Martindale*, 790 F.2d 1129, 1131-1132 (4th Cir.), cert. denied, 479 U.S. 855 (1986) (absent a showing that American authorities sought to evade constitutional requirements by employing foreign authorities, or a showing of coercion, statements made by an American suspect to British authorities were admissible); *United States* v. *Covington*, 783 F.2d at 1055-1056 (the *Edwards* rule was not triggered when foreign police ignored a suspect's request for

In this case, petitioner was not "taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda*, 384 U.S. at 444 (footnote omitted)) by American officials at the German police station.[8] Both military appellate courts rejected petitioner's contention that the German police officers should be treated as agents of the Army CID when they questioned petitioner because the two nations were conducting a "joint" investigation. Pet. App. 3a n.1, 18a-20a. See *United States* v. *Bagaric*,

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counsel and obtained his confession); *United States* v. *Nolan*, 551 F.2d 266, 273 (10th Cir.), cert. denied, 434 U.S. 904 (1977); *Kilday* v. *United States*, 481 F.2d 655 (5th Cir. 1973); *United States* v. *Trenary*, 473 F.2d 680, 681-682 (9th Cir. 1973); *United States* v. *Welch*, 455 F.2d 211 (2d Cir. 1972); *United States* v. *Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971); *United States* v. *Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970), cert. denied, 401 U.S. 939 (1971); *United States* v. *Vidal*, 23 M.J. 319 (C.M.A. 1987), cert. denied, No. 86-1699 (May 18, 1987) (a suspect's request for counsel made to foreign police does not trigger the *Edwards* rule and therefore does not invalidate a subsequent waiver of the suspect's *Miranda* rights when he is questioned by American officials); *United States* v. *Jones*, 6 M.J. 226 (C.M.A. 1979) (*Miranda* warnings are not essential to the validity of a confession given to foreign authorities).

Those decisions also highlight an anomaly in petitioner's argument. Under those decisions, if the German police had never informed petitioner that he had the right to speak with a lawyer, or had ignored petitioner's request for an attorney, and obtained a statement from him, that statement would not have been inadmissible under *Miranda*. If so, it is irrational to exclude petitioner's statements because the German police respected petitioner's request to see a lawyer and did not question him further.

[8] Indeed, it appears that petitioner was also not in custody at the time he was questioned by American officials at the CID office. If he was not in custody at that time, the principles of *Edwards* and *Roberson* are inapplicable on that ground as well. The courts below did not address the issue of custody, but instead appeared to assume that petitioner was in custody at the time he made his sworn statement.

706 F.2d 42, 69 (2d Cir.), cert. denied, 464 U.S. 840 (1983) (whether American law enforcement officers are engaged in a joint law enforcement endeavor with foreign officials is a question of fact). As the court of military review noted, "[n]o United States agent was present at the German police station during that day and none participated in any way with the Germans in their handling of [petitioner] and his wife." Pet. App. 11a.[9] Accordingly, petitioner's request for counsel to the Germans came before the point at which the *Miranda* and *Edwards* safeguards apply, *i.e.*, custody by American officials.

Contrary to petitioner's contention, the policies underlying this Court's decisions in *Edwards* and *Roberson* do not compel exclusion of the statements petitioner made to the CID officers in this case. Unlike in *Edwards*, there was no "badgering" of the suspect to abandon his request for counsel. The request had been made to officers of an entirely different nation who were conducting an independent investigation. And the CID officers gave petitioner complete *Miranda* warnings, so he was aware that if he wanted counsel before questioning by the American officials, all he had to do was ask. Unlike in *Roberson*, peti-

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[9] Petitioner has not renewed his claim that the German authorities should be treated as agents of the Army CID. Petitioner does, however, place a great deal of emphasis on what he terms the " 'joint' (*i.e.*, cooperative) effort" (Pet. 8) of the German and American police. He cites this supposed "cooperation" as support for his assertion (Pet. 8-9) that he "could only have concluded that his original request for counsel [made to the Germans] was meaningless," because he believed that the two nations had pooled their efforts. The short and complete answer to that claim is that petitioner has waived it by failing to testify about his state of mind and the voluntariness of his waiver. Petitioner's argument before this Court must stand or fall on whether *Edwards* applies to his case, and not on petitioner's belated assertions about his perception of the events leading up to his confession.

tioner would not likely have concluded that the failure to receive counsel when he asked the German police for permission to see a lawyer meant that any request he made to the American authorities would be futile. When the interrogation is conducted by officers of a different nation, a suspect would be expected to conclude that the interrogating officers meant just what they said: if the suspect wanted counsel before questioning, counsel would be provided. For that reason, the concerns that the Court expressed in *Edwards* and *Roberson* simply do not apply in a setting such as this one, where American officers question a suspect after he has been questioned by—and has requested counsel of—foreign law enforcement authorities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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